

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NORTH CAROLINA

FILED  
U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF NC

In Re:

DEWEY SANFORD ANTLEY,  
debtor.

Case No. 93-30807

Chapter 13

AUG 20 1993  
J. EARON GOSHON  
CLY:

Deputy Clerk

JUDGEMENT ENTERED ON AUG 20 1993

ORDER GRANTING RELIEF FROM STAY

This matter is before the court on the motion of NationsBanc Mortgage Corporation for relief from stay. After a review of the record and the appropriate case law and statutes the court concludes that NationsBanc's motion should be granted.

FINDINGS OF FACT

1. Debtor commenced this case under Chapter 13 of the Bankruptcy Code on June 1, 1993.
2. On June 29, 1988, the debtor executed a Deed of Trust Note ("Note") payable to Countrywide Funding Corporation in the principal sum of \$40,400.00. The Note was secured by the debtors residence at 9737 Feldbank Drive, North Carolina 28216.
3. The Note was later assigned to NationsBanc Mortgage Corporation.
4. Prior to June 1, 1993, the debtor defaulted in the payments obligations under the terms of the Note and NationsBanc commenced foreclosure proceedings against the residence in state court.
5. April 28, 1993, an Order permitting foreclosure was entered and filed.

6. On May 19, 1993, the real property was sold pursuant to a proper Notice of Foreclosure Sale and a Report of Foreclosure Sale was filed on the same date.

7. The debtor was in default under Note and delinquent for payments due from October 1, 1992, through June 1, 1993. The balance due on the Note as of June 17, 1993 was at least \$39,398.04.

8. The debtor's proposed plan provides for payment of pre-petition arrearage due NationsBanc through the Chapter 13 Trustee and direct monthly payments of for post-petition amounts due NationsBanc.

9. The debtor listed the residence in the petition as having a fair market value of \$45,790.00.

#### **DISCUSSION**

NationsBanc has filed a Motion for Relief From Stay requesting relief to continue foreclosure proceedings in state court against the debtor's property and alleging that it is not adequately protected in the debtor's bankruptcy. The issues presented in the motion before the court concern the rights of the mortgagor and mortgagee when a bankruptcy petition is filed during the upset bid period following a foreclosure sale of property. It has been the practice in this court to allow a debtor/mortgagor to reinstate the debt and cure the arrearage through the debtor's plan if the petition is filed during the upset bid period. After a review of the case law and the applicable state and federal statutes the court has concluded that this practice must be changed.

The court concludes that the debtor does not have a right to reinstate the debt and cure the arrearages pursuant to a plan of reorganization after a foreclosure sale has taken place. The debtor's plan proposes to cure the pre-petition arrearage throughout the life of the plan and to make direct monthly payments to NationsBanc pursuant to the Note and Deed of Trust. The court concludes that this proposal does not adequately protect NationsBanc's interests and therefore relief from stay should be granted.

A. Debtor's Interest after Foreclosure.

Under North Carolina case law the foreclosure sale becomes final upon the expiration of the upset bid period. N.C.G.S.

§ 45-21.29A. The mortgagor/debtor retains the equitable right of redemption, the right to "regain complete title by paying the mortgage debt, plus any interest and any costs accrued," until the foreclosure becomes final. *Webster's Real Estate Law in North Carolina*, § 258 at 306 (3rd ed. 1988); see also, N.C.G.S.

§ 45-21.20 (power of sale terminated upon payment in full of the debt plus expenses of initiated foreclosure). Upon the filing of a bankruptcy petition the equitable right of redemption becomes an asset of the estate. Thus, the debtor does not enter bankruptcy with a right to reinstate the debt, nor does the Code provide the debtor with such relief. In this instance, the debtor's attempt to pay the arrearages throughout the life of the plan and to make direct monthly payments pursuant to the Note and Deed of Trust is without merit.

Judge Small thoroughly addressed this issue in a factually similar case in *In re DiCello*, 80 B.R. 769 (Bankr. E.D.N.C. 1987). In *DiCello* the debtor filed a Chapter 13 petition on the tenth day of the upset bid period following the foreclosure sale of the debtor's residence. The holder of the second deed of trust on the residence sought relief from stay to complete the foreclosure proceeding on the property. The debtor proposed to cure the default on the deed of trust through the plan and reinstate the original terms making payments directly to the secured creditor outside the plan. *Id.* at 770-71. The court concluded that the debtor did not have a right to cure the default pursuant to § 1322(b)(5) because after the foreclosure sale had been held, "there had been sufficiently 'serious alterations of [the] security holder's rights', so that the right to cure the default under § 1322(b)(5) had been terminated." *Id.* at 772 (quoting, *In re Roach*, 824 F.2d 1370, 1376 (3rd Cir. 1987)); *c.f.*, *In re Glenn*, 760 F.2d 1428, 1435 (6th Cir.) *cert. denied*, 474 U.S. 849 (1985).

The court then considered whether the debtor could exercise the equitable right of redemption. Accepting the majority position the court concluded that § 108(b), rather than § 362 of the Code, governed the time limits for a Chapter 13 debtor to exercise the right of redemption. *DiCello*, 80 B.R. at 772-73. Section 108(b) provides the debtor a minimum of 60 days from the petition date to exercise the right of redemption provided by "applicable nonbankruptcy law." 11 U.S.C. § 108(b). It is undisputed that 60 days have passed since the debtor in this case filed her petition.

Nevertheless, the court is of the opinion that the debtor's equitable right of redemption has not expired. The court again agrees with *DiCello*. In North Carolina the termination of the equitable right of redemption is contingent of the expiration of the upset bid period. Because the bankruptcy petition was filed before the upset bid period expired, § 362 of the Code stayed the filing of upset bids and therefore indirectly suspended the running of the debtor's equitable right of redemption. *DiCello*, 80 B.R. at 773. Thus, the debtor may still exercise her right of redemption.

B. Relief From Stay.

Section 362(d) of the Code provides that a creditor may seek relief from the automatic stay for, among others, "cause, including the lack of adequate protection of an interest in property." 11 U.S.C. § 362(d)(1). In the present case, NationsBanc's interest is the accelerated value of the debt that is secured by the debtor's residence; the interest is not payment pursuant to the terms of the mortgage. The debtor's plan proposal to pay the arrearage over the life of the plan and virtually reinstate the debt does not constitute adequate protection of NationsBanc's interests.

C. Conclusion.

The filing of a bankruptcy petition during the upset bid period does not grant the debtor a right to cure and reinstate a mortgage debt after the property has been sold at a foreclosure sale. The debtor is limited to her equitable right of redemption, and such right exists for a minimum of 60 days from the petition date. The debtor's proposed plan attempts to cure and reinstate

the debt owed to NationsBanc, however the court finds that such a plan exceeds the debtor's rights under the Bankruptcy Code. The court concludes that the debtor's plan does not adequately protect NationsBanc's interests, and relief from stay should be granted.

In this instance, the upset bid period and consequently the debtor's equitable right of redemption was to expire at 5:00 p.m. on the date the petition was filed. The upset bid period and the equity of redemption period will begin to run again and will expire one day from the effective date of this Order. To ensure that the respective parties have notice of the Order and an opportunity to exercise their rights this Order will become effective on August 30, 1993.

It is therefore ORDERED that NationsBanc's Motion for Relief from Stay is hereby GRANTED.

This the 20th day of August, 1993.

  
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George R. Hodges  
United States Bankruptcy Judge